Supreme Court, U.S.
FILED
MAY 31 1995
OFFICE OF THE CLERK

No. 94-1669

In the
Supreme Court of the United States
October Term, 1994

ROBERT BRACE and ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND CATL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

TIMOTHY J. CHORVAT
C. DAVID WATSON
JENNER & BLOCK
One IBM Plaza, 38th Fl.
Chicago, Illinois 60611
Telephone: (312) 222-9350

ROBIN L. RIVETT
*JAMES S. BURLING
GREGORY W. MCCRACKEN
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED iii

IDENTITY AND INTEREST OF AMICI CURIAE 1

IMPLICATIONS OF THE CIRCUIT COURT'S DECISION 3

OPINIONS BELOW 6

STATEMENT OF THE CASE 6

SUMMARY OF ARGUMENT 10

REASONS FOR GRANTING THE WRIT 11

I. THIS CASE PRESENTS A QUESTION OF INTERPRETATION OF FEDERAL LAW WHICH IS OF GREAT IMPORTANCE TO THE NATION'S FARMERS AND REQUIRES THIS COURT'S DEFINITIVE RESOLUTION 11

II. THE COURT OF APPEALS WRONGLY DECIDED THIS CASE IN A MANNER TYPICAL OF THE CONTINUING MISINTERPRETATION OF THE CLEAN WATER ACT BY FEDERAL ADMINISTRATIVE AGENCIES AND MANY FEDERAL COURTS 12

Page

A. Brace's Activities, Typical of Many of the Nation's Farmers, Constitute "Normal Farming Activities" 12

B. Brace's Activities Did Not Fall Within the Recapture Provisions of 33 U.S.C. § 1344(f)(2) 15

CONCLUSION 19

TABLE OF AUTHORITIES CITED

Page

Cases

American Ship Building Co. v. National Labor Relations Board, 380 U.S. 300 (1965) 17

Avoyelles Sportsmen's League, Inc. v. Marsh, 715 F.2d 897 (5th Cir. 1983) 18

Bayou Marcus Livestock & Agricultural Co. v. United States Environmental Protection Agency, No. 88-30275, 1989 WL 206151 (N.D. Fla. Nov. 3, 1989) 18

Board of Governors of the Federal Reserve System v. Dimension Financial Corp., 474 U.S. 361 (1986) 17

Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority, 464 U.S. 89 (1983) 17

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 17

Conant v. United States, 786 F.2d 1008 (11th Cir. 1986) 18

Environmental Defense Fund v. Tidwell, 837 F. Supp. 1344 (E.D. N.C. 1992) 18

Page

Federal Maritime Commission v. Seatrain Lines, Inc., 411 U.S. 726 (1973) 17

Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374 (1965) 16

K Mart Corp. v. Cartier, Inc., 486 U.S. 281 (1988) 17

Leslie Salt Co. v. United States, 896 F.2d 354 (9th Cir. 1990) 4

Pacific Coast Medical Enterprises v. Harris, 633 F.2d 123 (9th Cir. 1980) 16

Pittston Coal Group v. Sebben, 488 U.S. 105 (1988) 17

Save Our Community v. United States Environmental Protection Agency, 971 F.2d 1155 (5th Cir. 1992) . . 17

Securities and Exchange Commission v. Sloan, 436 U.S. 103 (1978) 16

United States v. Akers, 785 F.2d 814 (9th Cir.), cert. denied, 479 U.S. 828 (1986) 18-19

United States v. Huebner, 752 F.2d 1235 (7th Cir. 1985) 18

United States v. Larkins, 657 F. Supp. 76 (W.D. Ky. 1987), aff'd, 852 F.2d 189 (6th Cir. 1989) 18

Page

United States v. Lopez, 63 U.S.L.W. 4343 (1995) . . 19

Statutes

33 U.S.C. § 404 6,16

§ 404(f) 5,15,20

§ 404(f)(1) 3-5,7,10-11,17

§ 404(f)(2) 7,11-12,15-18

§ 1251 6

§ 1311(a) 6

§ 1344(a) 6

§ 1344(d) 6

§ 1344(f)(1) 14

§ 1344(f)(1)(A) 7

§ 1344(f)(2) 7,15,19

33 C.F.R. § 323.4(a)(1)(ii) 8,14

§ 323.4(c) 16

§ 328.3(b) 6

40 C.F.R. § 232.2(r) 6

Page

Rules

Supreme Court Rule 37.3 1

Miscellaneous

4 A Legislative History of the Clean Water Act of 1977 (Senate Debate of August 4, 1977, Statement of Sen. Muskie) 14-15

Legislative History of the Water Pollution Act Amendments of 1972 (1973) (Senate Debate, Dec. 15, 1977) 19

The Federalist No. 17 (A. Hamilton) (Clinton Rossiter ed. 1961) 19

No. 94-1669

In the
Supreme Court of the United States
October Term, 1994

ROBERT BRACE and ROBERT BRACE FARMS, INC.,
a Pennsylvania corporation,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF AMICI CURIAE PACIFIC LEGAL FOUNDATION, CALIFORNIA FARM BUREAU FEDERATION, CALIFORNIA CATTLEMEN'S ASSOCIATION, NATIONAL CATTLEMEN'S ASSOCIATION, AND CATL FUND IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

IDENTITY AND INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37.3, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae on behalf of itself and California Farm Bureau Federation, California Cattlemen's Association, National Cattlemen's Association, and the CATL Fund (Pacific Legal Foundation, *et al.*) in support of the petition for writ of certiorari. Written consent to the filing of this brief has been

granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of litigating matters affecting the public interest. PLF has nearly 25,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. PLF's policy is set by a Board of Trustees comprised of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community. It has authorized the filing of this brief.

California Farm Bureau Federation (CFBF) is a nonprofit, voluntary membership corporation organized under the laws of the State of California for the purpose of advancing agriculture and working to resolve the problems facing the agricultural community in California. Its members are 53 county farm bureaus, through which it represents more than 70,000 member families in 56 California counties and more than 80% of the commercial farmers in California. CFBF is the state's largest general farm organization.

California Cattlemen's Association (CCA), a nonprofit corporation founded in 1917, represents the state's beef cattle industry in legislative and regulatory affairs. CCA has a membership base of approximately 3,200 ranchers and feedlot operators who operate on nearly 40 million acres of private and public land throughout the state. Beef cattle producers contributed $1.5 billion to the state's $19.7 billion agricultural economy in 1993, and the industry provides more than 26,000 jobs from the ranch level to the processing level in the State of California.

National Cattlemen's Association (NCA) is a nonprofit trade association that represents over 230,000 cattlemen and other persons from all segments of the beef cattle industry. Affiliated with 46 state cattle associations and 29 national

beef breed organizations, it acts as the national spokesperson and issues manager for all segments of the United States beef cattle industry. NCA is an advocate for advancing the economic, political, and social interests of the United States cattle industry. It works to create a positive business environment and to maintain the land from which its members make their living while assuring customers a safe, affordable, and wholesome beef product.

The CATL Fund was created by NCA to assist landowners and others similarly situated, including cattlemen, in establishing broad-based legal precedent to protect property rights, promote free enterprise, and minimize regulatory abuses.

IMPLICATIONS OF THE CIRCUIT COURT'S DECISION

This case presents a very important issue in need of resolution. Farmers and ranchers, including those represented by Pacific Legal Foundation, *et al.*, are greatly in need of an interpretation of the exemption for farming activities in Clean Water Act § 404(f)(1) which accords with Congress' original intent. The lower federal courts, the United States Environmental Protection Agency (EPA), and the Army Corps of Engineers (Corps) have interpreted the exemption in such a narrow and crabbed fashion that normal farming activities can now require a dredge and fill permit under Section 404 which if not obtained can even subject farmers and ranchers to civil and criminal liability under the Clean Water Act.

Numerous farms and ranches have fields now planted in pasture which were often formerly planted in hay or row crops. Farm or ranch families and their lenders have always treated those pastures as part of an integrated agricultural operation which could be managed into or out of pasture, hay, or row crops according to the demands of market forces. The loss of management flexibility over such lands impairs the economic vitality of those farms and ranches both by limiting farmers' and ranchers' ability to use them in

response to market forces and by decreasing their value as collateral for necessary financing.

Of paramount concern to California are other serious problems which the Third Circuit's decision in this case presents. California agriculture is facing tremendous pressures, both from the environmental community and from the state's growing urban populations, to use its water resources more efficiently by either converting pasture to higher yield crops which consume less water, or by leveling and changing water distribution on lands retained in pasture. Most pasture in California is irrigated, although some subirrigated pasture, *i.e.*, "natural" wetlands, and seasonally dry, nonirrigated pasture exists.[1] Thus far, the industry's water conservation efforts have yielded dramatic results: agriculture has not increased its share of the state water budget in 20 years, even as it has increased its productivity by 50%.

However, the withdrawal of pasture lands from the shield of the "normal farming activities" exemption under Section 404(f)(1) will not only impair the economic viability of individual farms and ranches, but will also threaten the future of California agriculture by interfering with the agricultural water conservation programs now underway in the state.

The plight of one farming family, out of many similarly affected, provides a dramatic example of the misconstruction of the farming exemption and its consequences. In 1989, Fred and Nancy Cline bought the old Poppe ranch in

---

[1] The distinction between "natural" wetlands pasture and irrigated wetlands pasture is immaterial to the issues before the Court in this case because the Army Corps of Engineers has taken the position that artificial wetlands fall within the reach of its dredge and fill regulation. The Ninth Circuit has supported this position. *Leslie Salt Co. v. United States*, 896 F.2d 354 (9th Cir. 1990).

southern Sonoma County, California, and planned to operate a small winery, grow grapes, and raise cattle on it. Although the eastern portion of the ranch adjacent to Sonoma Creek was subject to flooding during winter, and as such was wetlands, those wetlands had been converted to agricultural use for pasture, planting hay, and growing oats since the mid-1880s. As such, they are previously converted wetlands exempt from the requirement of a Section 404 dredge and fill permit for farming. Consequently, Mr. Cline continued the land's agricultural use, including discing and improving its soil, extending some ditches, repairing one tidal gate and adding another and leveling some areas to make them more useful for grape growing.

The Army Corps of Engineers did not approve of Mr. Cline's continued farming however. Despite extensive evidence that the farming and grazing had continually occurred on the farm's wetlands for many years, the Corps' personnel argued that the land was not farmable and had reverted to its preagricultural wetlands condition. The Corps further argued that Mr. Cline's plowing and planting of oats and rye on the wetlands was a "new use" notwithstanding the fact the land had been planted in crops on numerous occasions previously. The Corps' position if upheld will subject the farm land to Section 404 permitting requirements and Mr. Cline to civil or criminal penalties.

Mr. Cline's improvement of soil and drainage and his alternating use of farmland from grazing to growing row crops is a normal farming activity which regularly occurs in California and throughout the country. Yet under the Corps' interpretation of Section 404(f) the normal farming activity should nevertheless be regulated and possibly prohibited.

Add to the Clines a lengthy list of farmers across this Nation who have been similarly affected by the misconstruction of Section 404(f)(1) and it becomes clear that the need to review this instant case is compelling. Due to the importance of this issue for farmers and ranchers nationwide, amici Pacific Legal Foundation, *et al.*, provide

this amicus curiae brief in support of the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals (App. at 19a-41a) is reported at 41 F.3d 117 (3d Cir. 1994).[2] The opinion of the District Court (App. at 1a-18a (Adjud.)) is unreported.

STATEMENT OF THE CASE

Congress enacted the Federal Water Pollution Control Act, 33 U.S.C. § 1251, *et seq.* (Clean Water Act or CWA), to control and abate water pollution, not to regulate farming. Section 301(a) of that statute prohibits the discharge of any pollutant into navigable waters of the United States, except pursuant to a permit. 33 U.S.C. § 1311(a). Section 404 of the CWA authorizes the Secretary of the Army, through the Corps, to issue such permits "for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a) and (d). Those provisions impact American farmers only because the EPA and the Corps have defined the term "waters of the United States" to include "wetlands." 33 C.F.R. § 328.3(b); 40 C.F.R. § 232.2(r).[3]

Congress specifically intended that farmers not be subjected to regulation of their day-to-day decisions on the

---

This brief shall cite to the Appendix to the Petition as "App. at __."

[3] In this case, Brace stipulated that the 30-acre site (Site) at issue falls within the definition of "wetlands" set out at 33 C.F.R. § 328.3(b) and 40 C.F.R. § 232.2(r).

basis of such wetland provisions. Rather, in Section 404(f)(1) of the CWA, Congress specified that those provisions would apply only to attempts to convert non-farming uses into farming uses. Thus, no permit is required to discharge dredged or fill material resulting from "normal farming" activities.[4] Congress did provide one limitation to the "normal farming" exception, in a "recapture provision." Section 404(f)(2) of the CWA provides that notwithstanding the exemptions set out in Section 404(f)(1), a permit shall be required for any discharge of dredged or fill material into the navigable waters incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters reduced. 33 U.S.C. § 1344(f)(2). Thus, Section 404(f) exempts "normal farming" activities from the permitting process under the CWA unless the activity both brings a wetlands area into "a use to which it was not

---

[4] (1) [T]he discharge of dredged or fill material --

(A) [for] normal farming, silviculture, and ranching activities such as plowing, seeding, cultivating, minor drainage, harvesting for the production of food, fiber and forest products, or upland soil and water conservation practices ....

....

(C) for the purpose of construction or maintenance of farm or stock ponds or irrigation ditches, or the maintenance of drainage ditches . . . is not prohibited by or otherwise subject to regulation under this section . . . .

33 U.S.C. § 1344(f)(1)(A).

previously subject" *and* impedes the flow of navigable waters.

The Corps and EPA have adopted regulations that restrict the "normal farming" exemption by requiring that any such activity

> must be part of an established (i.e., on-going) farming, silviculture, or ranching operation and must be in accordance with definitions in § 323.4(a)(1)(iii) .... Activities which bring an area into farming, silviculture, or ranching use are not part of an established operation. An operation ceases to be established when the area on which it was conducted has been converted to another use or has lain idle so long that modifications to the hydrological regime are necessary to resume operations.

33 C.F.R. § 323.4(a)(1)(ii).

As set out more fully in the Petition for Writ of Certiorari (the Petition), Robert Brace (Brace) farms approximately 600 acres of farmland in Erie County, Pennsylvania, including his family's 140-acre homestead farm, which Brace bought from his father in 1975. Brace's family has farmed that land without interruption since the 1930s. This case arises from Brace's rehabilitation of a drainage system on the homestead farm, including the 30-acre wetlands Site contained within that farm.

Before Brace purchased the homestead farm, his family had used that property, including the Site, to pasture cows and horses. In 1976, Brace decided to improve the farm by updating and expanding the existing drainage system, parts of which had fallen into disrepair. Upon review of the system the Agricultural Stabilization and Conservation Service, of the United States Department of Agriculture (ASCS), recommended reopening the drainage channel from the Site in order to permit the water to flow in its natural direction. Adjud. at 6.

In late 1976, Brace began implementing that plan. *Id.* at 6. From that date forward Brace worked continuously on the drainage system of the homestead farm, but due to limitations on availability of money, time, and equipment he did not complete the entire plan until 1987. *Id.* at 8. By 1986, however, Brace had completed his work on the drainage system and began planting rye, oats, and hay on part of the Site.

In 1987, EPA and the Corps issued administrative orders commanding Brace to cease and desist all discharge activities on the homestead farm. He was required to plug all main drainage tiles servicing the entire homestead farm and restore these areas of the farm now declared to be federally regulated wetlands to their "natural state." On October 4, 1990, the United States initiated the present litigation.

The District Court found for Brace, including that all of Brace's activities in rehabilitating the drainage system on the homestead farm were "normal farming," in the sense that they were activities conducted regularly by farmers in Western Pennsylvania, and Erie County in particular. The District Court also ruled that the CWA's recapture provisions do not apply because Brace did not subject the Site to any new use, and that he did not change the reach, or impede the flow, of navigable waters of the United States. *Id.* at 10a-11a.

The United States Court of Appeals for the Third Circuit reversed. That court dismissed the District Court's reference to the regular practices of Erie County farmers and reversed the District Court's factual finding that Brace's activities constituted "normal agricultural activity." App. at 29a-38a. The Court of Appeals also decided that Brace fell within the recapture provision by altering the use of the Site from pasture land to crop land, which, in the Court of Appeals' view was "a new, non-wetland use." App. at 39a.

Accordingly, Brace was held liable for violating the wetlands regulatory scheme.

SUMMARY OF ARGUMENT

This Court should grant certiorari to review the decision of the United States Court of Appeals for the Third Circuit for two reasons. One reason is the importance to the nation's farmers and ranchers of a proper interpretation of the exemption to Section 404's dredge and fill permit requirement for normal farming. Farmers and ranchers depend on the existence of the exemption to be able to adequately manage and improve their operations in response to the demands of market forces and the need to conserve resources. Congress enacted the exemption to free farmers and ranchers from the burdens of dredge and fill permits and from potential liability under the CWA for engaging in their livelihood on wetlands previously converted to agricultural use. Resolution of the meaning and applicability of the Section 404(f)(1) exemption will benefit each farmer or rancher in the United States who has wetlands subject to agricultural use.

The second reason is that this Court needs to definitively vindicate Congress' intent in enacting the Section 404(f)(1) exemption. Until now, the EPA and the Corps, along with a number of federal courts which have visited the matter, have given the exemption a crabbed and unduly narrow interpretation which has vitiated the exemption's usefulness to farmers and ranchers. This misinterpretation arises from the assumption, sometimes expressed and sometimes not, that the Clean Water Act should forbid any impairment of the quality and extent of wetlands under all circumstances. Although this assumption is false, it has provided the rationale for decisions such as the one which the Court of Appeals rendered in this case. That decision introduces farmers and ranchers across the United States to

new uncertainty and so narrows the exemption for normal farming as to deprive it of any significance.

By granting certiorari, this Court can provide all farmers and ranchers with the certainty that, under normal circumstances, they can use wetlands previously converted to agricultural purposes without obtaining a permit from the Corps and without the fear of criminal and civil liability under the Clean Water Act. This Court can make clear that "normal farming activities" are not limited to growing only a particular row crop, but include other agricultural pursuits, such as pasturing livestock and rotating crops, which farmers have undertaken for thousands of years. This Court can also confirm that the recapture provision of the CWA, Section 404(f)(2), means what it says: farmers fall within the terms of that provision, and thus come within the ambit of federal wetlands regulation, only if they both change the use of land from some other use to a farming use, *and* that change in use reduces the reach of navigable waters.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS A QUESTION OF INTERPRETATION OF FEDERAL LAW WHICH IS OF GREAT IMPORTANCE TO THE NATION'S FARMERS AND REQUIRES THIS COURT'S DEFINITIVE RESOLUTION

The Court of Appeals' decision endangers the ability of American farmers and ranchers to rely on the exemptions that Congress enacted to shield them from the massive burdens of obtaining prior permission from the EPA and Corps under the Clean Water Act every time they move soil on their previously farmed wetlands. The statement of the identity and interest of amici curiae above demonstrated the importance of the Section 404(f)(1) exemption to farmers and ranchers.

By deciding this case, this Court can make clear that: (1) growing crops and pasturing livestock are both well within the scope of "normal farming" activities, and farmers and ranchers can rotate crops or switch from growing crops to pasturing livestock as part of "normal farming"; and (2) the recapture provision of Section 404(f)(2) of the CWA does not come into play where a farmer merely alters the mix of agricultural uses of his land. Rather it applies where landowners categorically change the use of their land, such as from a farm to a residential development, or build an industrial establishment on raw land. Without this Court's intervention, federal wetlands regulation will continue to impose huge burdens and uncertainties on the farmers and ranchers of the United States, an occurrence never intended by Congress.

II

THE COURT OF APPEALS WRONGLY DECIDED THIS CASE IN A MANNER TYPICAL OF THE CONTINUING MISINTERPRETATION OF THE CLEAN WATER ACT BY FEDERAL ADMINISTRATIVE AGENCIES AND MANY FEDERAL COURTS

A. Brace's Activities, Typical of Many of the Nation's Farmers, Constitute "Normal Farming Activities"

The Court of Appeals overturned the District Court's determination that Brace's activities were "normal farming," apparently on the basis that his work on the drainage system cannot, as a matter of law, have been normal farming.[5] The

---

[5] The Third Circuit declared that "[r]egardless of how 'typical' or 'necessary' such activities are in Erie County, (continued...)

Court also stated that, through his work on the drainage system, "Brace converted a thirty-acre site that was not suitable for farming into a site that is suitable for farming, and thus 'brought an area into farming use.'" App. at 33a. Because the Site was used for pasturing cows and horses for half a century before the Court of Appeals' decision, the Court can only have reached that conclusion by deciding that pasturing livestock is not "normal farming."

Such a position has no basis and creates a huge threat to farmers and ranchers throughout the United States. The livelihood of millions of American farmers and ranchers depends on draining water from fields and grazing livestock. This Court should not permit the Court of Appeals to limit "normal farming" to growing row crops only, and thus undercut the "normal farming" exception to the CWA.

There is no need for the Court of Appeals' overly restrictive interpretation. Section 404(f) of the CWA requires no such reading: it merely exempts "normal farming" from the permit requirement and lists several nonexhaustive examples of such normal farming, including "plowing, seeding, cultivating, minor drainage, and harvesting for the production of food, fiber, and forest products, or upland soil and water conservation practices ...." The legislative history of the CWA shows that Congress specifically envisioned that drainage would be included in "normal farming" activities. "[T]he drainage exemption is very clearly intended to put to rest, once and for all, the fears that permits are required for draining poor drained farm or forest land, of which millions of acres exist. No permits are required for such drainage. Permits are required only where ditches or channels are dredged in a

---

[5] (...continued)
Pennsylvania, they were not "normal farming activities." App. at 35a.

swamp, marsh, bog, or other truly aquatic area." *4 A Legislative History of the Clean Water Act of 1977* (*Legislative History*) at 1042 (Senate Debate of August 4, 1977, Statement of Sen. Muskie).[6] Even the Corps' regulations do not require such a drastic result.[7] There is no reason that drainage of continuously farmed and grazed land

---

[6] During the 1977 debates on amendments to the Clean Water Act, Senator Bentsen stated: "I find it offensive that before a small farmer can dig new irrigation ditches he must first write the U.S. Army for permission, complete the necessary Federal forms, and then wait an average of 125 days while his request is shuffled from one bureaucrat's in-box to another. I also find it offensive that a farmer who has paid hard-earned money for new land 2 years ago may now be prohibited by the Government from improving that land for agriculturally productive uses, and will not receive a penny in just compensation for his loss of income from the property." *Legislative History* at 905. Senator Hart replied that the exemption "does exempt activities which are normal farming or agricultural activities, run by individuals or family farmers." *Id.* at 907-08. Senator Hart went so far as to state that "[e]very proposal before the Senate, every one, is designed to exempt those normal activities from that kind of overregulation by the Corps of Engineers or anybody else. Any argument that is made on the floor to the contrary simply misrepresents one or the other of the proposals upon which we will be asked to vote before this debate is over." *Id.* at 928.

[7] However, the regulation, 33 C.F.R. § 324(a)(1)(ii), goes well beyond the CWA's own provision on the subject. The statute exempts all "normal farming" from the permitting process, and does not limit the exemption to prior or existing agricultural uses. *See* 33 U.S.C. § 1344(f)(1).

is anything other than "normal farming" under these provisions.

In the decades preceding the government's decision to bring this case, Brace and his family did three things with the homestead farm: they pastured farm animals there, refurbished the drainage system to grow row crops, and, finally, began growing oats, alfalfa and hay on that land. All three activities are what Congress enacted Section 404(f) to protect. *See Legislative History* at 869 ("family business or family farming activity need not bear the burden of an effort directed primarily at regulating the kinds of activities which interfere with the overall ecological integrity of the Nation's waters").

B. Brace's Activities Did Not Fall Within the Recapture Provisions of 33 U.S.C. § 1344(f)(2)

The District Court concluded not only that Brace's activities were protected by the "normal farming" exemption, but also that Brace did not fall within the "recapture" provision of Section 404(f)(2) of the CWA, 33 U.S.C. § 1344(f)(2). Under that provision, the exemptions in Section 404(f)(1) are overridden for any discharge of fill into wetlands "incidental to any activity having as its purpose bringing an area of the navigable waters into a use to which it was not previously subject, where the flow or circulation of navigable waters may be impaired or the reach of such waters be reduced." 33 U.S.C. § 1344(f)(2).

The language of Section 404(f)(2) requires two elements to be satisfied before the recapture becomes effective: (1) that the activity be intended to bring an area into "a use to which it was not previously subject"; and (2) that the activity impair the reach or flow of the navigable waters of the United States. The District Court found that neither element was present in this case. Adjud. at 14. By installing a drainage system throughout the homestead farm, including the Site, Brace did not introduce any new "use" to

the Site. He merely changed the manner in which he used the Site as part of his farm. He did not introduce any new or foreign fill to the Site but simply relocated soil cleaned out of the drainage ditches on the same land. Adjud. at 23. Finally, Brace's rehabilitation of the drainage system did not impair the reach or flow of the waters of the United States. Rather, his work merely improved the flow of water in its natural channels and directions. As the Site is dry except for times of excessive precipitation, water continues to reach everywhere that it did before Brace's rehabilitation work. Adjud. at 11a.

The Court of Appeals incorrectly concluded, however, that Brace fell under the recapture provision of Section 404(f)(2) by relying on the Corps' regulation interpreting Section 404(f)(2). That regulation provides that "[a] conversion of a Section 404 wetland to a non-wetland is a change in use of an area of waters of the United States." 33 C.F.R. § 323.4(c). The Corps' regulation confuses an area's fulfillment of the technical definition of "wetland" with its use. There is no necessary correlation between the two. Both wetland and nonwetland areas are used for farming purposes in the United States and, changing from one crop to another, or changing an area from pasturage to cropland, is a normal farming activity, not a new use. Congress certainly never intended to require farmers to seek the federal government's permission to change crop patterns, or refurbish a drainage ditch.

Statutory interpretation is ultimately the responsibility of this Court. *Securities and Exchange Commission v. Sloan*, 436 U.S. 103, 118 (1978); *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965). Courts are also the primary interpreters of regulations. *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980) ("Agency regulations must be consistent with and in furtherance of the purposes and policies embodied in the congressional statutes which authorize them."). Although an

agency's interpretation of its governing statute is generally entitled to deference in the absence of any clear expression of congressional intent, *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), that deference "is not to be applied to alter the clearly expressed intent of Congress. *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 368 (1986). *See also Pittston Coal Group v. Sebben*, 488 U.S. 105, 113 (1988); *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291-92 (1988); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 745 (1973) ("[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate."). In particular, deference to administrative agencies "'cannot be allowed to slip into a judicial inertia which results in the unauthorized assumption by an agency of major policy decisions properly made by Congress.'" *Bureau of Alcohol, Tobacco & Firearms v. Federal Labor Relations Authority*, 464 U.S. 89, 97 (1983) (quoting *American Ship Building Co. v. National Labor Relations Board*, 380 U.S. 300, 318 (1965)).

Under the standard this Court has established, the Corps' regulation implementing the recapture provision of Section 404(f)(2) exceeds its statutory mandate and is thus invalid. Nothing in the CWA suggests that Congress authorized the EPA or Corps to outlaw every conversion of wetlands to nonwetlands. Indeed CWA doesn't even prohibit "draining" a wetland--only "discharging a pollutent" into one. *See Save Our Community v. United States Environmental Protection Agency*, 971 F.2d 1155, 1164-65 (5th Cir. 1992). Congress' intent to exclude agricultural uses from regulation under the CWA is beyond question. *See* 33 U.S.C. § 404(f)(1), (2). Where, as in this case, the wetlands at issue at all times were used for agricultural purposes, the Corps cannot use its own fiat to exclude a farmer from an exemption to which he is entitled by statute.

Furthermore, none of the prior decisions on which the Court of Appeals relied provides precedent for the Court's radical expansion of the regulatory threat to America's farmers and ranchers. Virtually every prior case that has applied the recapture provision of Section 404(f)(2) has done so in circumstances where the landowner had undertaken a truly new use for the property at issue, or at least revived a use that had not been undertaken in decades. *See Conant v. United States*, 786 F.2d 1008, 1010 (11th Cir. 1986) (new fish farm was not part of any established farming operation); *United States v. Huebner*, 752 F.2d 1235, 1242 (7th Cir. 1985) (wetlands had not been farmed in at least 20 years); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897 (5th Cir. 1983) (wetlands had not been farmed before); *Environmental Defense Fund v. Tidwell*, 837 F. Supp. 1344, 1347 (E.D. N.C. 1992) (no indication that original swamp had ever been farmed before); *Bayou Marcus Livestock & Agricultural Co. v. United States Environmental Protection Agency*, No. 88-30275, 1989 WL 206151 (N.D. Fla. Nov. 3, 1989) (wetlands not previously farmed); *United States v. Larkins*, 657 F. Supp. 76, 79, 85 (W.D. Ky. 1987), *aff'd*, 852 F.2d 189 (6th Cir. 1989) (land had not been farmed since at least 1950). Unlike this action, each of those cases presented a combination of truly new land uses and impairment of water flow that is exactly what Section 404(f)(2) was intended to prevent.[8]

---

[8] *United States v. Akers*, 785 F.2d 814 (9th Cir.), *cert. denied*, 479 U.S. 828 (1986), is distinguishable from the present case. There, a farmer drained nearly 3,000 acres of wetlands, known as the "Big Swamp," and built a dike more than two miles long. The Ninth Circuit found the sheer scope of the draining to be significant: "[T]he substantiality of the impact on the wetland . . . must be considered in

(continued...)

CONCLUSION

If farmers and ranchers are subject to regulatory oversight every time they alter the mix of activities on their lands, they will not be able to manage their properties effectively, and will be exposed to the constant and paralyzing risk of bureaucratic intervention. Congress never intended to create this situation, nor did it even intend to regulate farming at all. Rather, it sought to prevent the conversion of nonfarm wetlands into agricultural or industrial uses, and to prevent the filling of wetlands by nonfarm developers or industrial concerns. By specifically exempting agriculture, Congress maintained a policy begun by the founders of the United States, keep the federal government out of regulating the day-to-day activities of agriculture. *See, e.g., The Federalist No. 17,* at 118 (A. Hamilton) (Clinton Rossiter ed. 1961). *See also United States v. Lopez*, 63 U.S.L.W. 4343, 4355 (1995) (Thomas, J., concurring).

By eviscerating the statutory exemption for "normal farming," the Court of Appeals for the Third Circuit has destroyed a balance that Congress carefully set. This Court

---

[8] (...continued)
evaluating the reach of [33 U.S.C. § 1344(f)(2)]." 785 F.2d at 822. Although the Third Circuit dismissed the importance of this factor (App. at 34a-35a), that view does not comport with Congress' intent. *See Legislative History of the Water Pollution Act Amendments of 1972* (1973) at 474 (Senate Debate, Dec. 15, 1977).

should grant certiorari in this case, reverse the decision of the Court of Appeals, and supply the definitive interpretation of the farming exemption in Section 404(f) of the Clean Water Act.

DATED: May, 1995.

Respectfully submitted,

TIMOTHY J. CHORVAT
C. DAVID WATSON
Jenner & Block
One IBM Plaza, 38th Fl.
Chicago, Illinois 60611
Telephone: (312) 222-9350

ROBIN L. RIVETT
*JAMES S. BURLING
GREGORY W. MCCRACKEN
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive,
Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
Attorneys for Amici Curiae